No. 72-525

FIL
FEB 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DONALD S. COOPER
Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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INDEX

	Page
PETITION FOR REHEARING	1
I. EQUAL JUSTICE AND DUE PROCESS OF LAW REQUIRE EQUAL APPLICATION TO CITIZENS OF UNITED STATES AND MANDATE REVERSAL OF PETITIONER'S CONVICTION ...	1
II. JURY SELECTION PROCEEDINGS FOLLOWED BY THE UNITED STATES DISTRICT COURT OF COLORADO FOR THE TRIAL JURY IN THIS MATTER WERE VIOLATIVE OF PETITIONER'S CONSTITUTIONAL RIGHTS	3
III. PETITIONER WAS ADVERSELY AFFECTED AT TRIAL BECAUSE OF ASSOCIATE COUNSEL UTILIZED BY RETAINED TRIAL COUNSEL	4
CONCLUSION	5
CERTIFICATION	6
CERTIFICATE OF MAILING	6

TABLE OF CASES

Page

United States vs. Cooper
464 F 2d 648 2

United States vs. Karsten
Criminal Action No. 71-CR-317
United States District Court of
Colorado..... 2, 3

OTHER AUTHORITIES

CONSTITUTION OF THE UNITED STATES OF AMERICA, AMENDMENT V..... 3

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PETITION FOR REHEARING

COMES NOW the Petitioner, DONALD S. COOPER, and hereby respectfully moves this Honorable Court for rehearing of the Petition for Writ of Certiorari heretofore denied by order of January 8, 1973. In support of this petition, the following is submitted:

I

EQUAL JUSTICE AND DUE PROCESS OF LAW REQUIRE EQUAL APPLICATION TO CITIZENS OF UNITED STATES AND MANDATE REVERSAL OF PETITIONER'S CONVICTION.

Petitioner presently stands convicted of a violation of Title 18 USC 656, Misapplication of Bank Funds. Prior reference in this matter has been made to United States vs. Karsten, Criminal Action No. 71-CR-317, United States District Court of Colorado, as an illustration of the difficulty of the various courts with respect to the aforementioned code section. The similarities between that case and the case at bar material to this presentation are as follows: (a) Both cases arose within the jurisdiction of the United States District Court of Colorado; (b) Both cases involved alleged violations of Title 18 USC 656; (c) Both cases were prosecuted by the same United States Attorney and the same Assistant United States Attorney; (d) Both cases involved the loaning of money of a qualifying bank to third parties or entities which inured to the benefit of the accused.

At the trial level, the instant case was heard by one United States District Judge for Colorado and the Karsten case was heard by another United States District Judge for Colorado. During the course of prosecuting the Karsten case, which followed the primary case upon which these proceedings are based in point of time, was handled by the same United States Attorney who, in presenting the Karsten case to the Court unqualifiedly stated that the Karsten case was more meritorious than the Cooper case for conviction due to the fact that the bank officer in that case had no authority to borrow monies in any sum from the bank with which he was connected. In argument to the Court, the Assistant United States Attorney made definite reference to the applicability of the Cooper case as being identical from a factual

standpoint. These illustrations were previously cited to this Court in the initial petition for Writ of Certiorari presented to this Court.

Despite the admitted, agreed and identical similarity of the cases by the United States Attorney, the United States District Court in the Karsten case determined those "identical" facts did not constitute an offense under Title 18, Section 656 and discharged the defendant.

Thus, two men, charged with the same offense, based upon identical facts, both citizens of the United States, experienced dissimilar results. Mr. Karsten is a free man and Mr. Cooper stands convicted. This result occurs solely by virtue of the fact that the respective cases were heard by different judges sitting within the same district.

Due process of law as embodied within the Fifth Amendment to the Constitution of the United States of America together with a fundamental and basic concept of equal justice requires that such a totally opposite result cannot be permitted to persist.

II

JURY SELECTION PROCEEDINGS FOLLOWED BY THE UNITED STATES DISTRICT COURT OF COLORADO FOR THE TRIAL JURY IN THIS MATTER WAS VIOLATIVE OF PETITIONER'S CONSTITUTIONAL RIGHTS.

During the course of commencement of trial, counsel for Mr. Cooper, the Petitioner, joined with counsel for Francis R. Salazar, co-defendent

in the trial proceedings, in objecting to the jury selection procedure followed by the Court, and more particularly concerning the systematic exclusion of prospective jurors of the Negro race, of Spanish descent, and from the area of southern Colorado.

By communication with counsel for the petitioner Salazar, counsel in this matter is advised that this question is being presented to this Court by way of Petition for Rehearing in that matter and in the interest of volume, time and avoidance of duplication, the Petitioner, DONALD S. COOPER, would seek to adopt that presentation to this Court.

III

PETITIONER WAS ADVERSELY AFFECTED AT TRIAL BECAUSE OF ASSOCIATE COUNSEL UTILIZED BY RETAINED TRIAL COUNSEL.

Petitioner retained present counsel to defend him in the initial trial stage of the case at bar. Counsel associated himself in that trial with Robert L. Pitler, Esq. During the trial evidence was received to the effect that associate trial counsel was a conduit for some funds that were purportedly submitted for the repayment of funds allegedly misapplied. Counsel and the Court attempted to handle the situation in the least obvious manner, but the transaction was of sufficient moment to cause the Circuit Court to comment on it in its opinion. Needless to say its observation was undoubtedly also perceived by the trial jury and operated to the prejudice of the Petitioner. The prejudice attaching under such circumstances was not perceived by counsel

at trial nor by co-counsel, opposing counsel or the Court, as all indicated that the question was handled, as was intended, in a manner to allow presentation of the facts regarding the repayment but not to emphasize the role of associate trial counsel and thus avoid a situation where trial counsel would be required to testify on the matter.

The ineffectiveness of the manner sought was illustrated by the opinion of the Circuit Court. The illustration by that Court of its observations leaves no question but what the trial jury entertained like observation, and the Petitioner was thus deprived, innocently and unintentionally, of a trial free from patently harmful, yet practically unexplained evidence, due solely to an extra-judicial transaction all parties and the Court sought to minimize.

CONCLUSION

Based upon the foregoing presentation Petitioner seeks rehearing of his Petition for Writ of Certiorari heretofore filed with this Court. Petitioner has sought to present to this Court herein matters that had not previously been called to the attention of the Court and of sufficient moment to warrant this Court to reconsider his Petition for Writ of Certiorari, reverse the judgment of the Circuit Court as it affirmed the trial court, and remand this matter for dismissal or further hearing in the lower courts as deemed appropriate by this Court.

Respectfully submitted,

CARL L. HARTHUN, ESQ.
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Denver, Colorado 80202

CERTIFICATION

Counsel for the Petitioner hereby certifies to this Court that this Petition for Rehearing is presented to this Court in good faith based upon matter not previously called to the attention of the Court bearing upon the conviction of the Petitioner and meritorious of consideration by the Court. This Petition is not interposed for delay.

Carl L. Harthun, Esq.
Counsel for Petitioner

CERTIFICATE OF MAILING

The undersigned does hereby certify that he has this _____ day of February, A.D. 1973 deposited in the United States Mails, postage prepaid, three copies of the foregoing Petition for Rehearing addressed to:

Hon. Erwin N. Griswold
Solicitor General
United States Dept. of Justice
Washington, D.C.

Carl L. Harthun, Esq.
Counsel for Petitioner